

Washington Supreme Court: Ecology wrong on water right

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Capital Press

Published: October 9, 2015 1:19PM

The Washington Supreme Court has ruled the Department of Ecology erred in granting a city a new water right at the expense of downstream rivers.

OLYMPIA — For a second time, the Washington State Supreme Court has ruled the Department of Ecology was wrong to cite an overriding public interest in permanently redistributing rights in a water-short basin.

The court ruled 6-3 Thursday that DOE erred when it permitted the Western Washington city of Yelm to draw more groundwater to accommodate growth.

The withdrawal would have put the basin's rivers and creeks at risk of occasionally falling below state-mandated minimum flows, a water right senior to Yelm's new right.

DOE argued that the move was in the public's interest and that a mitigation plan would actually enhance the environment. Yelm resident Sara Foster, who feared the city's withdrawal would harm her domestic well, sued and received support from the Center for Environmental Law and Policy and the Carnegie Group, a Thurston County landowners' organization.

Writing for the majority, Justice Charles Johnson dismissed the mitigation plan as irrelevant and said a growing city was hardly unusual.

He stated that overriding public interest could only justify temporary water withdrawals. Using it to support a permanent transfer of water rights was "an end-run around the normal appropriation process," he wrote.

Johnson cited the court's 2013 ruling that struck down water rights DOE granted to accommodate growth in Skagit County. The Swinomish Indian Tribal Community sued, citing the impact on minimum flows in the Skagit River.

DOE officials said the agency will evaluate how the Yelm ruling will affect the agency's ability to create and transfer water rights.

"We are taking (the) ruling under advisement, and we will assess what other water management tools we may use in the future to make decisions on complex water needs in water constrained bases," DOE Director Maia Bellon said in a written statement.

The state sets minimum flows in streams to protect fish and existing water rights. Many streams fell below minimum levels this summer. In some basins, DOE issued cut-off notices to irrigators.

The suit did not challenge DOE's authority to temporarily transfer water rights in a drought emergency. Also, only water rights protecting instream flows are vulnerable to temporary curtailment in the public interest. Other senior water rights have stronger protections, according to Johnson's ruling.

The Yelm case has been followed by agriculture groups, but the ruling — striking down the permanent transfer of water rights to a city — may have limited direct impact on producers, said Mike Schwisow, government relations consultant for the Washington State Water Resources Association.

In the dissenting opinion, Justice Charles Wiggins stated the Yelm case was “nothing like” the Swinomish case. The Yelm suit challenged a plan developed over 20 years among many agencies, while the Swinomish suit challenged the outcome of a lawsuit between DOE and Skagit County.

Wiggins disagreed that “withdrawals” in the public interest applied only to temporary transfers. He called the majority's interpretation “novel and unprecedented.”